(6)

No. 93-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ED PLAUT, *et al.*,
Petitioners,

v.

SPENDTHRIFT FARM, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR PACIFIC MUTUAL LIFE INSURANCE CO. IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

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MOTION FOR LEAVE TO FILE A BRIEF FOR PACIFIC MUTUAL LIFE INSURANCE CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pacific Mutual Life Insurance Company hereby moves, pursuant to Rule 37.4 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of petitioners. Counsel for petitioners, for respondents Spendthrift Farm, Gibson, Dunn & Crutcher, and Francis M. Wheat, Deloitte & Touche, and for the United States have consented to the filing. Counsel for respondent Bateman, Eichler, Hill Richards, Inc. has declined to consent. Counsel for Norman D. Owens and American International Bloodstock Agency, Inc., has not responded to the request for consent.*

The question presented in this case—the constitutional validity of Section 27A(b) of the Securities Exchange

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* Pacific Mutual has no parent corporation, and its subsidiaries, other than wholly owned ones, are World-Wide Holdings Ltd. (a United Kingdom corporation) and United Planners Group, Inc. (an Arizona corporation). *See* S. Ct. R. 29.1.

Act (Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387, codified at 15 U.S.C. § 78aa-1(b))—was presented last Term in *Morgan Stanley & Co. et al. v. Pacific Mutual Life Ins. Co.*, No. 93-609. The Court there affirmed, by an equally divided vote, the Fifth Circuit's judgment holding Section 27A(b) constitutional. 114 S. Ct. 1827 (1994). The Court subsequently denied the petitioners' request for rehearing or a stay of mandate in *Morgan Stanley*, returning the case to the lower courts, where (if the Fifth Circuit sends the case back to the district court) Pacific Mutual will resume pre-trial and trial proceedings on its claim for damages from securities fraud committed by the Morgan Stanley petitioners. 62 U.S.L.W. 3862 (1994). The Morgan Stanley petitioners have already indicated that, if the Court holds Section 27A(b) invalid in the present case and the *Morgan Stanley* litigation is still pending at that time, they will raise the ruling as a ground for dismissing Pacific Mutual's complaint. *See* Brief in Support of Rehearing, No. 93-609, at 5. Pacific Mutual therefore has a substantial interest in the resolution of this case, as well as an additional perspective on the questions presented, sharpened in the litigation of those issues last Term.

For those reasons, Pacific Mutual asks that its motion be granted.

Respectfully submitted,

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Dated: July 21, 1994

QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution.

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BRIEF FOR PACIFIC MUTUAL LIFE INSURANCE CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of Pacific Mutual Life Insurance Company is stated in the accompanying motion.[1]

SUMMARY OF ARGUMENT

Congress enacted Section 27A of the Securities Exchange Act, 15 U.S.C. § 78aa-1, to create, retroactively, a new statute of limitations for certain securities fraud plaintiffs. The Sixth Circuit, while accepting the validity of subsection (a)'s application of the new statute of limitations to pending cases, invalidated subsection (b)'s application of the new rule to cases under the old statute

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[1] Pacific Mutual has no parent corporation, and its subsidiaries, other than wholly owned ones, are World-Wide Holdings Ltd. (a United Kingdom corporation) and United Planners Group, Inc. (an Arizona corporation). *See* S. Ct. R. 29.1.

that had come to an end ("final cases"), finding a rigid constitutional rule protecting the sanctity of "final" judgments. *See Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (1993). It rested this rule on the Constitution's separation of powers. But the rigid pending/final rule the court of appeals announced, and its consequent invalidation of Section 27A(b), are simply insupportable under a straightforward analysis of separation-of-powers principles, or of due process principles.

I. SEPARATION OF POWERS

As affirmative authority, the court relied entirely on the principle of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), but that principle is irrelevant here. *Hayburn's Case* and its progeny state a limit on the courts' jurisdiction, applicable where a statute *at the time of judicial decision* renders the court unable on its own to award relief, treating it instead as a first step in a process requiring further independent determination by another Branch; such a statute effectively makes the court into a magistrate for another Branch and deprives the dispute of its character of a "case or controversy." That bar on assignment of non-judicial powers to the Article III courts has never been used, and could not logically be used, to invalidate a post-judgment statute because of its effect on a prior judgment. The doctrine of *Hayburn's Case* is simply beside the point in respondents' challenge to Section 27A(b).

Complementing the constitutional bar on assignment of non-judicial power to Article III courts (which is irrelevant here) is the constitutional bar on congressional usurpation of the judicial power, which seems to have been the real concern of the Sixth Circuit. *See Plaut*, 1 F.3d at 1498-99. But that principle, in terms of both text and underlying values, provides no support for the Sixth Circuit's formal, absolute pending/final line. What this core principle prohibits is congressional *adjudication* of specific cases—which is equally forbidden regardless of the pending or final status of the case Congress is adjudicating.

Section 27A(b) is obviously immune from this flaw, as the recognized validity of Section 27A(*a*), applying the limitations rule to pending cases, inescapably implies. Congress has not engaged in case-specific adjudication, but has altered the preexisting governing (limitations) law, leaving for the courts the entire task of finding facts, interpreting the law, and applying the law to the facts. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992); *United States v. Sioux Nation*, 448 U.S. 371 (1980). Congress therefore has not usurped the judicial power.

Nor does Section 27A(b) violate any broader structural separation-of-powers principle barring impairment of the courts' independent functioning. The statutory purpose plainly reflects no questioning of the independent law-interpreting or fact-finding judgment of the courts: it alters the substantive law, a properly legislative function, for the most legitimate of reasons. And the effect of the statute, which is of course narrowly confined to an unusual problem presented in a small number of cases, is in no sense to hamper the courts' functioning.

II. DUE PROCESS

Section 27A(b) readily meets the rationality standard for assessing substantive due process challenges to retroactive statutes even where they clearly upset settled expectations. *See, e.g., General Motors v. Romein*, 112 S. Ct. 1105, 1112 (1992); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). The retroactivity of Section 27A(b) precisely serves two related interests. First, it protects the legitimate expectations of plaintiffs who sued based on the governing limitations law prior to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberston*, 111 S. Ct. 2773 (1991). *See Plaut*, 1 F.3d at 1498 ("True, the litigants had proceeded under the assumption that the Kentucky Blue Sky law would apply," making the suit timely). Second, it en-

sures that a class of defendants accused of securities fraud are not allowed to escape liability without even having to answer the fraud charges. Indeed, these purposes, together with the implausibility of the claim that Section 27A(b) upsets defendants' reasonably settled expectations at all, mean that Section 27A(b) survives due process scrutiny under any standard short of an absolute rule protecting "final judgments."

There is no basis for such a rule. No holding of this Court establishes such a rule; and in any event, whatever language may appear in opinions from a bygone era of substantive due process, "vested rights" like contract and property rights are now covered by the rationality test. *See, e.g., United States v. Locke*, 471 U.S. 84, 104-05 (1985). The presence of a judgment "vesting" a preexisting legal right supplies no ground for a different standard. Indeed, it would be bizarre to afford higher (much less) absolute protection to rights sufficiently in dispute to have been litigated, simply because a final judgment has resolved the dispute, when property or contract rights so clear that they were never disputed in litigation remain subject to the lesser protection of the rationality standard.

Finally, if any judgments warrant any special protection against legislative disturbance, the judgments affected by Section 27A(b) are not among them. These judgments, entered only months before the legislation was enacted, had no effect but to relieve alleged malefactors of having to answer fraud charges on their merits, based entirely on a determination that the suits were not timely filed—under an interpretation of the governing statute of limitations that itself was unexpected. The statute then simply removed the limitations objection from the case. There is no justification for any special bar on legislation that thus reaches briefly back in time to eliminate a procedural defect to the consideration of serious charges on their merits, even if that defect resulted in an unappealed judgment.

ARGUMENT

Congress indisputably has broad legislative power to enact new legal standards and apply them to past events, protecting interests unprotected by preexisting law.[2] In particular, Congress may enact a new statute of limitations for plaintiffs who are out of time under the old statute, enabling them to pursue recovery for the wrongful conduct of defendants.[3] Under those principles, as the federal circuits have uniformly held, it is not seriously questionable that Congress could validly create a new (limitations) rule in Section 27A and make that rule available to plaintiffs whose cases under the preexisting rule were meritless (out of time) if those plaintiffs' cases were still "pending," whether in the district courts, in the courts of appeals, or in this Court. *See, e.g., Plaut*, 1 F.3d at 1493 n.11, 1495, 1496. The Sixth Circuit held, however, that the Constitution draws a sharp line prohibiting Congress from extending any new rule (here, the new limitations rule) to plaintiffs whose cases under the preexisting rule were meritless (here, out of time) if those cases had become "final" in a particular sense, *i.e.*, were no longer subject to trial-court or appellate-court review under currently applicable statutes and Rules.

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[2] *See, e.g., United States v. Carlton*, 114 S. Ct. 2018, 2021-22 (1994); *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); *R.A. Gray & Co.*, 467 U.S. at 729-33; *Turner Elkhorn, supra; United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 844, 849 (1990) (Scalia, J., concurring), citing, as cases involving express retroactive legislation, *Watson v. Mercer*, 33 U.S. (8 Pet.) 88 (1834); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1864); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Carpenter v. Wabash R. Co.*, 309 U.S. 23 (1940); and *Dickinson Indus. Site, Inc. v. Cowan*, 309 U.S. 382 (1940).

[3] *See Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945).

The immediate consequences of this rigid line between pending and final cases should by themselves be enough to raise doubts about the court of appeals' constitutional ruling. Under that ruling, defendants who have obtained final judgments under preexisting law acquire a constitutional immunity from the application of new law to them. But when Congress decides to confer a new legal right on individuals, it is hard to see why Congress should be constitutionally entitled to extend the right to individuals who never brought claims under preexisting law and to individuals who brought claims that are still pending, but not to individuals who brought claims that were finally adjudicated—such claims being equally meritless in all three situations (which is precisely why Congress finds it necessary to create the new right). In barring the equal treatment manifested in Section 27A, moreover, the Sixth Circuit's ruling would penalize those plaintiffs who are diligent enough to press their rights but responsible enough to refrain from pursuing merely dilatory appeals, and thus encourage the filing of meritless appeals to keep cases alive while awaiting expected legislation.[4] These results produce windfalls to certain defendants and disparities in treatment unrelated to any apparent interest in justice and, indeed, an incentive toward litigation conduct that is hardly consistent with the idea of respect for the courts.

Although the court of appeals rested its decision entirely on a rigid, formal line between pending and final

[4] All of the cases affected by Section 27A(b) *could* have been kept alive by filing purely protective appeals or certiorari petitions. This case, for example, was dismissed in mid-August 1991. With 30 days for an appeal and 90 days for a certiorari petition (together with minimal periods for responses and judicial action), the case, like all others affected by the June 1991 decision in *Lampf*, could easily have been maintained in "pending" status until the mid-December enactment of Section 27A. Of course, while appeals at the time "would have been . . . meritless and indeed sanctionable" (*Plaut*, 1 F.3d at 1489), the enactment of Section 27A would have transformed such appeals from sanctionable ones into indisputably meritorious ones.

cases, the court supplied no explanation of *why* such a bright line makes sense in terms of constitutional text or constitutional principles. As a result of that omission, the court plainly misread the relevant precedent (and history). In fact, no sound constitutional derivation of the pending/final line is possible. The constitutional challenge to Section 27A(b), in the end, rests only on formal invocation of labels and cannot be rooted in the substance of the relevant constitutional principles.[5]

I. SECTION 27A(b) DOES NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS.

The Sixth Circuit's opinion on its face reflects a strongly felt belief that a statute effecting a reopening of "final" judgments represents an offensive intrusion on judicial business. The court's sense of affront, however, is misplaced. Any such reaction should be dispelled by straightforward analysis of the relevant constitutional principles and (in light of those principles) relevant precedents, which shows that Section 27A(b) presents no constitutional problem. Congress has not (i) assigned nonjudicial power to the Article III courts, (ii) itself usurped

[5] This case presents no claim under the takings clause. *See* 62 U.S.L.W. 3806 (1994) (stating question presented); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531-34 (1992). Nor could it: if the due process attack on Section 27A(b) fails, as it does, the argument would fare no better repackaged as a takings claim. *See Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2289-92 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986); *see also Sperry Corp., supra*. It could not reasonably be said that the defendants whom Section 27A(b) compels to answer securities-fraud suits against them are "being forced to bear a burden 'which, in all fairness and justice, should be borne by the public as a whole.'" *Concrete Pipe*, 113 S. Ct. at 2292 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Not surprisingly, it is hard to find precedent treating a mere judgment of non-liability, which is not readily viewed as a transferable asset with market value, as "property" within the meaning of the takings clause. Of course, a judgment awarding a sum of money or confirming title to property would present a quite different situation under the takings clause.

the exercise of judicial power, or (iii) otherwise impaired the courts' independent performance of their proper function.[6]

A. Section 27A(b) Does Not Impose Non-Judicial Functions on the Article III Courts in Violation of Hayburn's Case.

The court of appeals' separation-of-powers conclusion relied entirely on *Hayburn's Case*, which, the court declared, firmly established a "rule that Congress may not retroactively disturb final judgments of the Federal courts" (1 F.3d at 1493), a rule the court then had to limit, first, to judgments on claims for retrospective as opposed to prospective relief (*id.* at 1494-95) and, second, to judgments between private parties (*id.* at 1497-98). But this reading of *Hayburn's Case* and its progeny simply misunderstands their holdings and their rationales. That

[6] We note that we have been unable to determine how often in the past Congress has enacted statutes, like Section 27A(b), setting new legal standards and applying them retroactively to parties with final judgments under old legal standards. On the one hand, it seems unlikely that, for example, coal miners who had finally lost claims for black lung benefits under preexisting law were excluded from the coverage of the legislation at issue in *Turner Elkhorn*, *supra*. On the other hand, one would expect laws like Section 27A(b) to be relatively rare, given Congress's avoidance of retroactive laws generally and this Court's long approval, until recently, of prospective adjudication in "law-changing" decisions, making it less necessary for *Congress* to act to protect reliance interests of litigants as it did in Section 27A. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). One prominent recent statute affecting "final" judgments—retroactively providing for attorney's fees for handicapped children suing to enforce their education rights—was upheld by the lower courts. *See Tonya K. v. Board of Education*, 847 F.2d 1243 (7th Cir. 1988); *Capello v. D.C. Board of Education*, 669 F. Supp. 14 (D.D.C. 1987).

Of course, the novelty of a measure is not itself a reason for finding it unconstitutional. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *CFTC v. Schor*, 478 U.S. 833 (1986).

line of authority forbids the Article III courts to accept jurisdiction where statutes in place *at the time* of the judicial decision mean that the judgment sought from the court could not itself afford relief (but would require, to be effective, some subsequent independent action by another Branch). This bar on assigning "non-judicial" tasks to the Article III courts is utterly irrelevant here: it simply has nothing to do with, and has never been used to challenge, a statute that is enacted *after a judgment* has been rendered, based on its allegedly improper effect on the earlier judgment.

Thus, in *Hayburn's Case* itself, the circuit courts were directed to rule on veterans' pension claims, but the results were merely to be transmitted to the Secretary of War for the Secretary, and ultimately Congress, to decide if the claims should be paid. 1 Stat. 243 (1792). The opinions of several Justices, sitting as Circuit Judges, explained that the assigned task was not "judicial" because the statute defining the task subjected the decision, before it could have any effect, to the action of non-Article III authorities. 2 U.S. (2 Dall.) at 411-14. The result was that the assigned task, amounting to performing the role of commissioners in an executive process, could not be accepted by an Article III court.

Although the Sixth Circuit did not examine the decisions following *Hayburn's Case*, all of them involve the very same circumstances and holdings: the jurisdiction-defining statute itself limited the court's power to grant relief, depriving the determination of its "case or controversy" character, and the courts therefore declined jurisdiction. In *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), this Court dismissed, "for want of jurisdiction," an appeal from a damages award rendered by a district judge under a statute that expressly made the award subject to the redetermination of the Secretary of the Treasury. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), this Court held that, as an Article III court, it could not take jurisdiction over

an appeal from a decision by the Court of Claims because the statute giving jurisdiction to the Court of Claims by its terms gave the Executive the authority " 'to revise all the decisions of that court requiring payment of money.' " *United States v. Jones*, 119 U.S. 477, 478 (1886) (quoting Chief Justice Taney's explanation in announcing judgment in *Gordon*); *see Gordon*, 117 U.S. 697, 703 (1885).[7] In *In re Sanborn*, 148 U.S. 222 (1893), the Court likewise held that it could not take jurisdiction over an appeal from certain Court of Claims decisions that were still subject to non-Article III revision.[8] And in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948), the Court held that Article III courts could not take on cases about the propriety of a Civil Aeronautics Board decision on the award of a foreign air carrier route, where the resolution of the case, by virtue of the jurisdiction-defining statute in place at the time, "ha[d] only the force of a recommendation to the President." *Id.* at 113.[9]

[7] Immediately after *Gordon* was decided, Congress repealed the provision subjecting the relevant Court of Claims decisions to executive revision, and those decisions thereby became fit for Article III review. *United States v. Jones*, *supra*; *see also La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

[8] In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), the Court confirmed the principle of this line of cases when it held that it must dismiss an appeal because Congress had repealed the cause of action, making relief impossible. In *Muskrat v. United States*, 219 U.S. 346, 352-55 (1911), the Court again relied on the principle established in *Hayburn's Case*, *Ferreira*, and *Gordon* to hold that an Article III court may not render a purely advisory opinion (on a statute's constitutionality), where the decision would furnish no concrete relief. *See also United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (Article III courts cannot "give or review judgments" that, at the time, are "conditioned" on agency revisory authority; therefore, plaintiff's entitlement to money must be decided in refund action).

[9] *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874), held that once Congress had made the Court of Claims' cases into Article III controversies, subject to Supreme Court review, those *statutes* meant that the Executive lacked authority to revise a Court of Claims judgment before paying it. *United States v. Waters*, 133 U.S. 208 (1890), likewise turned on a statutory conclusion.

These cases thus establish a constitutional constraint on the jurisdiction assumable by Article III courts, barring such jurisdiction where statutes in place at the time of decision limit the court's relief authority and thereby destroy the "judicial," or "case or controversy," character of the assigned task. Here, as in the other cases affected by Section 27A(b), however, there was at all times a live case or controversy for the district court to resolve—with no lack of concrete stakes, no deficiency in adversarial incentive, and no threat to judicial independence (or dignity) from acting as a magistrate for another co-equal Branch. The district court had one set of laws to apply prior to *Lampf*, another set in the months after *Lampf*, and still another set after Congress restored the pre-*Lampf* limitations period. But at every moment, the task for the court was entirely judicial in the fullest constitutional sense: the court's determination could itself provide relief, without need for further independent action by any non-Article III authority. Quite simply, there is no *Hayburn's Case* problem in this case.

The Sixth Circuit's complete misreading of *Hayburn's Case* is betrayed by the need it found to make two exceptions to its initially absolute rule forbidding congressional alteration of an earlier judgment. Without explanation of what Article III principle gave rise to the exceptions, the court deemed *Hayburn's Case* not to apply to suits against the United States and to suits seeking judgments awarding prospective relief—the first exception accommodating this Court's decisions in *United States v. Sioux Nation*, 448 U.S. 371 (1980) (and *Cherokee Nation v. United States*, 270 U.S. 476 (1926), and *Pope v. United States*, 323 U.S. 1 (1944)); the second accommodating the decisions recognizing Congress's power to alter the law and thereby compel modification of a prospective judgment (*e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*,

59 U.S. (18 How.) 421 (1855); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870)). But the doctrine of *Hayburn's Case* plainly makes neither an exception for prospective judgments (*e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., supra*) nor an exception for cases against the United States (*see Hayburn's Case, Ferreira, Gordon*, etc.). The Sixth Circuit's need to trim the doctrine to fit the desired focus on post-judgment statutes confirms that the doctrine has nothing to do with such statutes.

Contrary to the Sixth Circuit's evident misunderstanding, *Hayburn's Case* does *not* state a constitutional bar on statutes that nullify the effect of federal court judgments. If that were the concern, statutes that nullify a district court's judgment would be called into question even if enacted while the case was pending on appeal. But *Hayburn's Case* has no such effect (*see, e.g., Schooner Peggy, supra*), because such a statute does not somehow retroactively undo the case-or-controversy character of the district court judgment at the time it was entered. A statute enacted after appellate review is exhausted no more impairs the Article III nature of earlier judgments.

Only a statute that, at the time of decision, makes the judicial determination "subject to later review or alteration" violates the principle of *Hayburn's Case* and thus justifies refusal to accept jurisdiction. *Chicago & Southern Air Lines*, 333 U.S. at 114. There was no such statute in this case. Accordingly, any separation-of-powers claim that Section 27A(b) is invalid because of its effect on pre-enactment judgments must look to some principle other than that found in *Hayburn's Case*.

B. Section 27A(b) Does Not Represent a Congressional Usurpation of Judicial Authority.

The Constitution, in addition to barring the Article III exercise of non-judicial power, textually prohibits Congress from exercising judicial power. It was this principle that the Sixth Circuit seemed to focus on in questioning

whether Section 27A(b) represents a usurpation of judicial power. 1 F.3d at 1499. Having recognized the principle, however, the Sixth Circuit failed to identify what that principle protects and, as a consequence, incorrectly adopted a pending/final line that bears no correspondence to this constitutional constraint and incorrectly found Section 27A(b) invalid.

Unlike other statutes that may be easily imagined, Section 27A(b) should quite readily be seen to present no problem under the constitutional prohibition on congressional exercise of judicial power. The simple and sufficient reason is that Congress did not make any case-specific adjudicatory decisions: rather, it changed the law and left findings of fact, interpretation of law, application of law and decision, and other case-specific determinations to the courts. Indeed, if the focus is on the substance of the congressional action, as it should be, then the validity of Section 27A(b) follows directly from the validity of Section 27A(a). It is the undisputable character of Section 27A as a proper legislative change of legal standards, rather than any sort of adjudicatory act, that underlies the universal acceptance of the validity of the statute applying the new limitations period to *pending* cases. Application of the very same congressional change of law to "final" cases does not in any substantive way transform what Congress did into an adjudicatory act.

To accuse Congress of having usurped judicial authority in this case, then, the Sixth Circuit had to disregard the nature of the congressional action and focus exclusively on the reopening of a final judgment as a *per se* assumption of judicial power—even by a non-adjudicatory congressional change of law. But such a refusal to look at the character of the decision made by Congress is insupportable. There is no basis to question the sensible and deeply rooted understanding that case-specific adjudication—finding facts, interpreting existing law, directing the entry of judgments, framing remedies, perhaps making other case-specific determinations—is a necessary

defining characteristic of the judicial power. *See, e.g., Robertson*, 112 S. Ct. at 1413 ("we find nothing in [the statute] that purported to direct any particular findings of fact or application of law, old or new, to fact"); *Freytag v. Commissioner*, 111 S. Ct. 2631, 2655 (1991) (Scalia, J., concurring) (to " 'adjudicate,' *i.e.*, . . . determine facts, apply a rule of law to those facts, and thus arrive at a decision . . . [is a] necessary . . . condition[] for the exercise of federal judicial power"). Because Congress engaged in no case-specific adjudication, it did not exercise judicial power in enacting Section 27A(b).[10]

The Sixth Circuit's focus on "finality" for its own sake, rather than on the nature of the congressional decision, finds no support in the text of Article III. Nothing there speaks of "finality," much less assumes or constitutionalizes any particular set of rules for appealing, reopening, or otherwise further reviewing judgments—rules that, of course, have changed considerably over the years.[11] Nor do the historical materials cited by the Sixth Circuit (1

[10] One aspect of the bar on congressional exercise of the judicial power is presented in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where Congress ordered a disposition of a specific case (directing this Court, in a case on appeal from the Court of Claims, to order dismissal of the complaint) based on an improper congressional determination of the legal effect of a presidential pardon. As the Sixth Circuit itself recognized (1 F.3d at 1497 n.14), *Klein* could not support the asserted rigid bar on congresssional reopening of "final" judgments. Moreover, Section 27A(b), as a change of law with adjudication left to the courts, does not otherwise present any problem under *Klein*. This Court's recent decision in *Robertson, supra*, is nonetheless instructive here, in its unanimous understanding that a law-changing statute was not judicial even though it addressed particular cases by docket number. 112 S. Ct. at 1411.

[11] For example, under the old "term" system, a district court had plenary authority to alter its judgments during the same "term," which in many instances would have continued during the August-to-December period required for all cases affected by Section 27A to have been "pending." *See, e.g., Hill v. Hawes*, 320 U.S. 520, 524 (1944); 6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.04, at 60-31 (2d ed. 1993); 7 *id.* ¶ 60.09, at 60-65.

F.3d at 1490-91) reveal any objection to impairment of finality *per se*. Rather, the common feature of the identified legislative actions was their case-specific adjudicatory character—quite irrespective of whether there had previously been any final judgment or, indeed, any judicial proceedings at all.[12]

Not surprisingly, then, the central policy underlying the separation of the Article III courts into a politically independent Branch has nothing to do with finality for its own sake. That guarantee of independence, instead, has everything to do with the case-specific nature of governmental determinations: political independence is important for deciding the rights of identified parties through adjudicatory determinations—findings of fact, interpretations of existing law, fashioning of case-specific remedies, etc. Political independence is irrelevant, and indeed antithetical, to the enactment of new legal standards, including a new statute of limitations.

Precedent, too, supports rejection of the notion that congressional reopening of an Article III judgment is *per se* an exercise of judicial power. This Court has upheld statutes even when Congress has not changed the governing law, but instead *only* provided for reopening (or, what seems the same thing, further appellate review not otherwise available), even in individually identified cases. That was, in fact, precisely the holding of *United States v. Sioux Nation, supra*.[13] And contrary to the Sixth

[12] The quotes set forth in the Sixth Circuit opinion (1 F.3d at 1490-91 & nn.7, 8) speak for themselves in this regard. So, too, the listing of legislative actions in *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901-02) (cited at 1 F.3d at 1490 n.7), discloses that the common thread making them "judicial" was their case-specific adjudicatory character; nothing distinctive about final judgments can be inferred from the mix of listed actions—some of which affected final judgments, some pending cases, and some disputes not in litigation at all.

[13] This Court has likewise upheld such statutes as applied to the judgments (treated as such for full faith and credit purposes) of territorial courts and administrative tribunals. *See, e.g., Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940); *Stephens v. Cherokee*

Circuit's view, the fact that the United States was a party in *Sioux Nation* is irrelevant to the *Article III* issue of whether congressional reopening of an Article III judgment is *per se* an exercise of judicial power.

The question of congressional authority to require relitigation of the claim presented in *Sioux Nation*, without *res judicata*, necessarily involved two components: is reopening automatically an exercise of judicial authority? and if not, what specific legislative authority does Congress have in Article I to eliminate *res judicata*? The party status of the United States was key to the second step in the Court's upholding of the statute—namely, to locate the particular legislative power underlying the enacted statute, which merely directed the Court of Claims to ignore *res judicata*. The Court held that the debt-paying power set forth in Article I, § 8, authorized the waiver of *res judicata*. But the waiver notion and debt-paying power have no bearing on the *Sioux Nation* Court's first necessary step, concluding that reopening a final judgment of an Article III court is *not* a uniquely judicial power.[14] It is that proposition, unaffected by the identity of the defendant, which suffices to undermine the Sixth Circuit's holding here.[15]

In any event, Section 27A(b) presents even less of a separation-of-powers issue than the statute upheld in *Sioux Nation*, since Section 27A(b) undeniably creates new law

Nation, supra; Freeborn v. Smith, supra; Sampeyreac v. United States, 32 U.S. (7 Pet.) 222 (1833).

[14] After all, the "waiver of *res judicata*" that the Court found authorized by the debt-paying power could easily have been exercised by Congress itself, a Committee, or some Article I tribunal. The validity of requiring involvement of the Article III courts requires reasoning apart from the notion of waiver. By the same token, the interest of the Article III courts in independent functioning does not change based on the identity of the parties before them.

[15] Of course, the source of legislative power in this case presents no difficulty, since Section 27A(b) plainly rests on the Commerce Clause power to enact a statute of limitations for securities cases.

applicable in a generally defined class of cases, as opposed to merely requiring an Article III court to engage in relitigation of one individually identified dispute. *See, e.g., Pope v. United States, supra; Cherokee Nation v. United States, supra.* Thus, Section 27A(b) does not present either of the two features that appear key to the dissent in *Sioux Nation*: the statute in *Sioux Nation* applied to precisely one identified case and changed no law except the rule of finality (*res judicata*, preclusion).[16] Thus, this Court need not decide here in what circumstances, if any, Congress may have power to enact statutes changing only finality rules for purely private cases. Section 27A(b) plainly does more: it applies to a generally described class of cases and it does change the law to be applied. That is a proper legislative, not a judicial, act.

Section 27A(b), then, is in substance nothing but the creation of a new cause of action for certain securities fraud plaintiffs. In the absence of a formal bright line in the Constitution itself, there is no sound basis for refusing to look to the substance of this legislation in judging its validity.[17] Indeed, where as here the text does not

[16] The majority in *Sioux Nation* viewed the statute as creating "a new legal right" (448 U.S. at 407), whereas the dissent viewed it otherwise. 448 U.S. at 431 ("Congress has not changed the rule of law, it simply directed the judiciary to try again.").

[17] In this respect, this case is quite different from *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298 (1991), each of which ultimately rested on textually plain reasoning (supported by underlying structural principles): "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." 111 S. Ct. at 2312. Moreover, even the dissents in *Morrison v. Olson, supra*, and *Mistretta, supra*, rested on the view, rooted in the text, that each challenged statute involved an exercise of governmental power outside the constitutional structure in the simple sense that the power was not exercised by, or subject to the

speak clearly, this Court has ruled repeatedly that " 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.' " *CFTC v. Schor*, 478 U.S. 833, 848 (1986) (quoting *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 587 (1985)); *see Robertson*, 112 S. Ct. at 1414 (rejecting argument based on form of law where equivalent in substance was constitutional). *See also, e.g., West Lynn Creamery, Inc. v. Jonathan Healy*, 62 U.S.L.W. 4518, 4523 (1994) (rejecting form over substance in Commerce Clause application).

That focus on substance means, in the present context, that what matters is whether Congress has engaged in case-specific adjudication. If it has, the congressional action should be invalid whether the affected case is pending or final. But if it has not, the congressional action should be valid whether the affected cases are pending or final. As the accepted validity of Section 27A(a) establishes, Section 27A(b) falls into the latter category —valid as a legislative, not judicial, exercise of power.

C. Section 27A(b) Violates No Broader Separation of Powers Principle.

Section 27A(b) readily passes muster under a broader, less textually focused separation-of-powers standard forbidding congressional actions that unduly encroach on or impair the effective functioning of another Branch, including the Article III courts. *See, e.g., Mistretta v. United States*, 488 U.S. at 381-82; *CFTC v. Schor*, 478 U.S. at 850. A serious problem would be presented if Congress took action with the purpose or with the effect of chilling or impairing the courts' independent performance of their adjudicatory duties—by, for example, imposing a general rule requiring or approving relitigation

control of, the Congress, the President, or the courts—the sole repositories of the powers vested by Article I, Article II, and Article III. The Sixth Circuit's pending/final rule, by contrast, cannot in any comparable way be read off the face of the Constitution's assignment of powers.

of massive numbers of already-decided cases or by forcing relitigation for no reason other than a change in judicial personnel. But such improper purposes or effects, which may equally infect a statute applicable to pending cases, cannot support the Sixth Circuit's special rule for laws affecting final cases. And Section 27A(b) cannot remotely be faulted as effecting any systemic impairment or serving purposes inconsistent with the constitutional commitment of judicial independence.

Section 27A(b) has no disabling impact on the functioning of the Article III judiciary. Although not case-specific (there is no evidence Congress knew what cases would be pending or final when Section 27A was enacted), the provision applies only to the very small number of cases that were caught by surprise by *Lampf*. *Cf. CFTC v. Schor*, 448 U.S. at 851-57 (narrow scope of measure supports its validity). And the purpose of Section 27A(b) has nothing to do with any questioning of the independent judgment of courts. Congress made a substantive change of legal standards (applying it retroactively, as it is entitled to do) because of a perceived injustice in the preexisting state of the law. This purpose is no more offensive to any constitutional value as applied to cases where no further review is available (Section 27A(b)) than it is as applied to pending cases (Section 27A(a)), where it is unquestionably valid. Indeed, it is at the heart of Congress's responsibility to reconsider (and, if necessary) amend statutes after the courts make clear their present meaning.[18]

[18] In addition, the properly *legislative* character of the balancing of considerations relevant to prospectivity versus retroactivity of law-changing decisions follows, as a matter of both doctrinal logic and practical need, from this Court's recent decisions suggesting that such balancing is not properly a *judicial* task. *See Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Section 27A(b) readily satisfies the settled substantive due process standards applicable to retroactive legislation. And there is no sound basis in "vested rights" notions for creating a special due process standard for laws that upset otherwise-final judgments. (Of course, the takings clause and contract clause, neither at issue here, provide specific protections for certain vested rights.) Indeed, the judgment at issue here is particularly undeserving of any expansive due process protection.

A. Section 27A(b) Readily Passes the Applicable Rationality Test for Retroactive Legislation.

The standard governing the assessment whether retroactive legislation violates due process is by now firmly established. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *General Motors v. Romein*, 112 S. Ct. at 1112 (quoting *R.A. Gray & Co.*, 467 U.S. at 730). *See Carlton, supra; Sperry Corp., supra; Turner Elkhorn, supra.* This test thus recognizes that settled expectations *can* constitutionally be upset, as long as the legislature is rationally pursuing a legitimate objective in doing so. *See Turner Elkhorn*, 428 U.S. at 16 ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations") (citing numerous cases) (quoted in *R.A. Gray & Co.*, 467 U.S. at 729-30).

That standard is easily satisfied here. Retroactivity is justified by obvious dual purposes: to protect the expectation interests of plaintiffs who had relied on pre-*Lampf* limitations periods and pursued securities fraud claims; at the same time, to prevent a host of alleged malefactors

from escaping even having to answer fraud charges alleging damages in the billions of dollars. *See Securities Investors Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 3-6 (1991); 137 Cong. Rec. S18,623-24 (Nov. 27, 1991) (statement of Sen. Bryan). Both of these purposes extend equally to cases where dismissals under *Lampf* were on appeal and cases where no appeals were pending. And the means adopted—a law reaching back only a few months, and no further than the start of legislative consideration (*see Carlton*, 114 S. Ct. at 2023)—were precisely tailored to achieve those objectives; indeed, these means were proposed by representatives of the securities industry.[19] Section 27A(b) is a measure that, far from upsetting the expectations of the complaining party, affirmatively serves the very fairness interest in preserving expectations for which due process provides protection.

B. Invocation of "Vested Rights" Does Not Alter the Governing Standard.

Because Section 27A(b) so plainly meets the governing due process standard, and indeed impairs no legitimately settled expectations at all, any due process challenge to the statute must depend on establishing a special rule treating final judgments as sacrosanct. But this Court's decisions setting forth the modern standard for retroactive legislation, as quoted above, give no hint that judgment-based rights are outside the standard, let alone accorded the absolute protection without which any due process challenge to Section 27A(b) must fail. In particular, invocation of "vested rights" cases cannot justify such a standard.

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[19] The General Counsel of Morgan Stanley, testifying on behalf of the Securities Industry Association, proposed that "the timeliness of all cases pending at the time of the *Lampf* decision—whether or not those cases since have been dismissed—should be determined by application of the law as it stood at that time." *Securities Investors Legal Rights*, *supra*, at 91-92; *see id.* at 77-78.

To begin with, as this Court pointed out more than one hundred years ago, there is no "vested rights" clause in the Constitution; claims under the due process clause must instead be analyzed in due process terms. *Campbell v. Holt*, 115 U.S. 620, 628 (1885). Not surprisingly, therefore, it is clear that the established rationality standard applies to "vested" contract or property rights, both constituting "property" under the due process clause. *See, e.g., United States v. Locke*, 471 U.S. at 104-05; *National R.R. Passenger Corp. v. Atchison, T. & S.F. R.R.*, 470 U.S. 451, 471-72 (1985); *R.A. Gray & Co., supra*; *Kaiser Aluminum*, 494 U.S. at 856 (Scalia, J., concurring). Nothing about the advancement of a final judgment as the basis for the "vested" right provides a reason to fashion any different standard of due process protection.[20]

Even aside from the far-from-sacrosanct character of "final" judgments (*see* Fed. R. Civ. P. 60(b)),[21] rejection

[20] It is important to distinguish two roles a judgment may play: it may *create* a property right, or it may *vest* a property right. The former—as when a judgment gives rise to a judgment lien—is irrelevant here, having nothing to do with the pending/final line at issue or with "vested rights" doctrine. In any event, nothing about judgment-created property rights warrants distinctive protection over other forms of property (or contract) rights. For example, judicial liens do not have any general priority over liens arising from contracts. *See, e.g.*, D. Epstein, J. Landers, & S. Nickles, *Debtors and Creditors* 9, 48, 346 (3d ed. 1987); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). Under 11 U.S.C. § 506, there is generally "no distinction between consensual and nonconsensual liens." *Ron Pair*, 489 U.S. at 242 n.5. Pre-Code bankruptcy law often gave *less* protection to judgment-based liens than to consensual liens (*id.* at 246-48; *id.* at 253-54 (O'Connor, J., dissenting)), as does at least one provision of the current Code (11 U.S.C. § 522(f); *see Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991)).

[21] Rule 60(b) permits reopening where " 'appropriate to accomplish justice,' " with a strong practical eye on systemic needs for finality. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). This authority has been used to reopen judgments based on a change of law. *See, e.g., Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *Matarese*

of a unique standard of protection follows from a straightforward recognition of precisely what the vesting of a right by a final judgment is. The right that is vested is the *underlying right* at issue in the litigation, which itself must be a "property" interest protected by due process; and what the final judgment does is to settle, *i.e.*, confirm or eliminate grounds for dispute about, that right under then-applicable law.[22] But there is no due process reason why a property right sufficiently in doubt to have produced litigation should gain absolute (or even elevated) protection simply because the courts have resolved the dispute, while the generally applicable rationality standard applies to property rights (*e.g.*, in a bond, title to property, limits on contractual obligations) that were so clear and indisputable as never to have been litigated. Indeed, such a ranking of rights would turn the due process interest in settled expectations on its head.

Precedent in no way compels such a senseless result. Absolute protection could hardly be squared with this Court's decisions on many occasions and for many reasons sustaining laws that upset final judgments.[23] And the Court specifically said in *Fleming v. Rhodes* that "rights acquired by judgments have no different standing" for due process purposes from that afforded other "vested"

v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); *McGrath v. Potash*, 199 F.2d 166, 167 (D.C. Cir. 1952); *cf. Polites v. United States*, 364 U.S. 426, 433 (1960).

See also Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965) (granting rehearing four years after denial of certiorari).

[22] *See, e.g., Stewart v. Keyes*, 295 U.S. 403, 417 (1935); *Campbell v. Holt*, 115 U.S. at 623. Without such a final judgment, a court presented with a due process (or takings) challenge to a deprivation of some property would have to establish at the outset that the plaintiff did in fact enjoy the asserted property right under preexisting law. A pre-enactment final judgment would typically remove that issue from litigation.

[23] *See Fleming v. Rhodes*, 331 U.S. 100 (1947); *Hodges v. Snyder*, 261 U.S. 600 (1923); *Pennsylvania v. Wheeling & Belmont Bridge, supra; Paramino Lumber Co. v. Marshall, supra; Stephens v. Cherokee Nation, supra; Freeborn v. Smith, supra; Freeland v. Williams*, 131 U.S. 405 (1889); *Sampreyeac v. United States, supra.*

rights, such as those gained by contract. 331 U.S. at 107; *see Turner Elkhorn*, 428 U.S. at 16 (citing *Fleming*, which involved a statute upsetting otherwise-final judgments, in setting forth current rationality test for retroactive legislation).

Of course, it is possible to find statements in opinions from an earlier era asserting the special protection of "vested rights" based on final judgments. It is noteworthy, however, that the Court appears never to have rested a holding on such a proposition, not even in *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), cited by the Sixth Circuit (1 F.3d at 1493 n.12).[24] Perhaps more important, those statements come from an era when other "vested rights" were likewise given special protection,[25] and that era has long since passed. *See Landgraf*, 114 S.Ct. at 1500-01. Thus, nothing about the older precedents could fairly require repudiation of the modern rationality test where rights settled by final judgments are present.

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[24] Statements that respondents may rely on can be found, for example, in *Pennsylvania v. Wheeling & Belmont Bridge Co., supra*, *The Clinton Bridge, supra*, and *Hodges v. Snyder, supra*, but each of those decisions *upheld* laws that disturbed (prospective) final judgments.

As for *McCullough*, the relevant passage (172 U.S. at 122-23) neither mentions due process nor actually rules on the constitutional validity of the statute allegedly disturbing a final judgment, but leads only to the conclusion that the challenged statute did not in fact have that effect. Moreover, before that passage, the Court had already disposed of this threshold question of state law, noting that the state supreme court had *not* read the statute to apply to the judgment before it. Finally, and in any event, the statute at issue was indisputably passed while the case was *pending* (on appeal in the state courts). *McCullough*'s opaque passage, *dictum* in several ways and perhaps not even meant as a constitutional conclusion, can hardly settle the question here.

[25] *See, e.g., Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 340 (1922); *Stewart v. Keyes, supra; Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913).

C. A Recent Judgment for a Defendant on Limitations Grounds Generates No Vested Right to Avoid Answering Substantive Charges Under a New Limitations Rule.

Even if this Court were to conclude that *some* types of judgments warrant special due process protection, the particular type of judgment at issue here is the very last sort that deserves special protection as a "vested right" against legislation like Section 27A(b). First, the affected judgments, aside from being quite recent, neither confirmed title to some specific property nor awarded money. Instead, their only concrete effect was to give the defendants a future protection against having to answer securities-fraud charges under 10b-5. Thus, Section 27A(b) takes away no concrete "property" awarded by a judgment. *See Paramino Lumber Co., supra* (upholding statute reopening a specific damages dispute between private parties after a final adjudication for defendant by an administrative tribunal).[26] *See also* note 5, *supra* (takings clause).

Second, and more narrowly, Section 27A(b) upsets no interest of defendants in the resolution of a specific issue previously decided by the court—any more than does Section 27A(a). The statute changes the law on the sole issue previously decided, making the prior determination immaterial. In substance, Section 27A(b) does nothing other than provide the affected plaintiffs with a new claim —for securities fraud with a new limitations period. No due process fairness notion creates a "vested" right to immunity from having to answer the altered claim, which in its current form was not, and could not have been,

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[26] The reopened judgment in *Paramino* was by law deemed "final" when no judicial review was sought (33 U.S.C. § 921), was subsequently cited by this Court as a final judgment (*Fleming v. Rhodes*, 331 U.S. at 107 n.12), and would, at least today, have had the preclusive effect of a final judgment (*see University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)). For due process purposes, then, the upset judgment in *Paramino* is indistinguishable from the judgments at issue here.

litigated in the original action. *Cf. Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time"). And no due process protection for settled expectations could reasonably elevate form over substance to distinguish Section 27A from a law using the label of "new cause of action."

Third, and of course most narrowly, the issue on which the affected judgments rest is a statute of limitations—where, indeed, it was the old rather than new limitations rule that upset litigants' expectations. *Plaut*, 1 F.3d at 1498. This Court has often noted the distinctively weak character of claims assertedly "vested" as a result of a procedural or administrative defect, including timeliness bars. *See, e.g., Paramino Lumber Co.*, 309 U.S. at 378; *Graham & Foster*, 282 U.S. at 427, 429-30. The reasons are simple. Disturbing a "repose" that rests on limitations grounds does not make unlawful any conduct that was lawful at the time. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (classically retroactive law "alter[s] the *past* legal consequences of *past* actions").[27] And, as the Court observed in *Chase Sec. Corp.*, 325 U.S. at 316, the law need not indulge any assumption that the affected defendants' "conduct would have been different if the present

[27] Historically, statutes of limitations have been treated as "procedural" for choice-of-law and other purposes. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955); Restatement (Second) of Conflict of Laws §§ 142, 143 (1971). One consequence has been that there is no guarantee of freedom from having to answer the substance of a claim, or freedom from liability, based on a dismissal for untimeliness of the suit, because the same claim might be permitted in another jurisdiction. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[6], at III-162 (2d ed. 1993); Restatement (Second) of Conflict of Laws §§ 142, 143; Restatement (Second) of Judgments § 19 Comment f.

See also Block v. North Dakota, 461 U.S. 273, 291-92 (1983) (limitations bar does not determine underlying title to real property, even after final judgment).

rule had been known and the change [made by Section 27A(b)] foreseen."

Because statutes of limitations "represent expedients, rather than principles" (*Chase*, 325 U.S. at 314), "it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Id.* at 316; *see Electrical Workers Local 790, supra.*[28] There is simply no good reason for a different conclusion for those plaintiffs who had the lapse of time adjudicated against them before the legislature lengthened the period. There is still less reason for a different result where, as here, the superceded claim-barring limitations rule was itself the result of an unexpected judicial decision and the curative statute merely restored all parties to their original expectations. Section 27A(b), as such a statute, should be upheld.

[28] The Court in *Campbell v. Holt*, 115 U.S. at 628, specifically rejected the notion that "a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. . . . No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: July 21, 1994